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Brief of Joslyn for City of Detroit

Supreme Court of the United States

October Term, 1900.

Filed Feb. 25, 1901.

No. 411.

THE CITY OF DETROIT, THOMAS M. LUCKING AND WILLIAM B. THOMPSON, APPELLANTS,

vs.

RALZEMOND A. PARKER.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

No. 508.

CASS FARM COMPANY (LIMITED); J. O. HARRIS, BRYANT WALKER, ET AL., PLAINTIFF IN ERROR.

vs.

CITY OF DETROIT, THE BOARD OF PUBLIC WORKS OF DETROIT, D. W. H. MORELAND, ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF OF C. D. JOSLYN

FOR CITY OF DETROIT.

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BRIEF FOR APPELLANT.

From those allegations in the bill and answer in the cause first entitled above, which were taken as true, and from the proofs taken, the following facts appear:

The bill of complaint was filed to set aside certain assessments and tax sales of the appellee's land for delinquent taxes or assessments levied, one to defray the cost of grading and paving Woodward avenue and the other to defray the cost of grading and paving Blaine avenue, both in the City of Detroit. The two improvements and the assessments therefor were separate proceedings had at different times.

Woodward and Blaine avenues run at right angles to each other and intersect. The property of the appellee is situated at the southwest corner of said intersection, and consists of a house and lot, the latter having a frontage of 68.89 feet on Woodward and 200 feet on Blaine avenue. Its value is $10,000 and upwards. The other lots on Blaine avenue are 127½ feet deep, with a frontage varying from 40 to 50 feet. A map is herewith attached showing the location of the property.

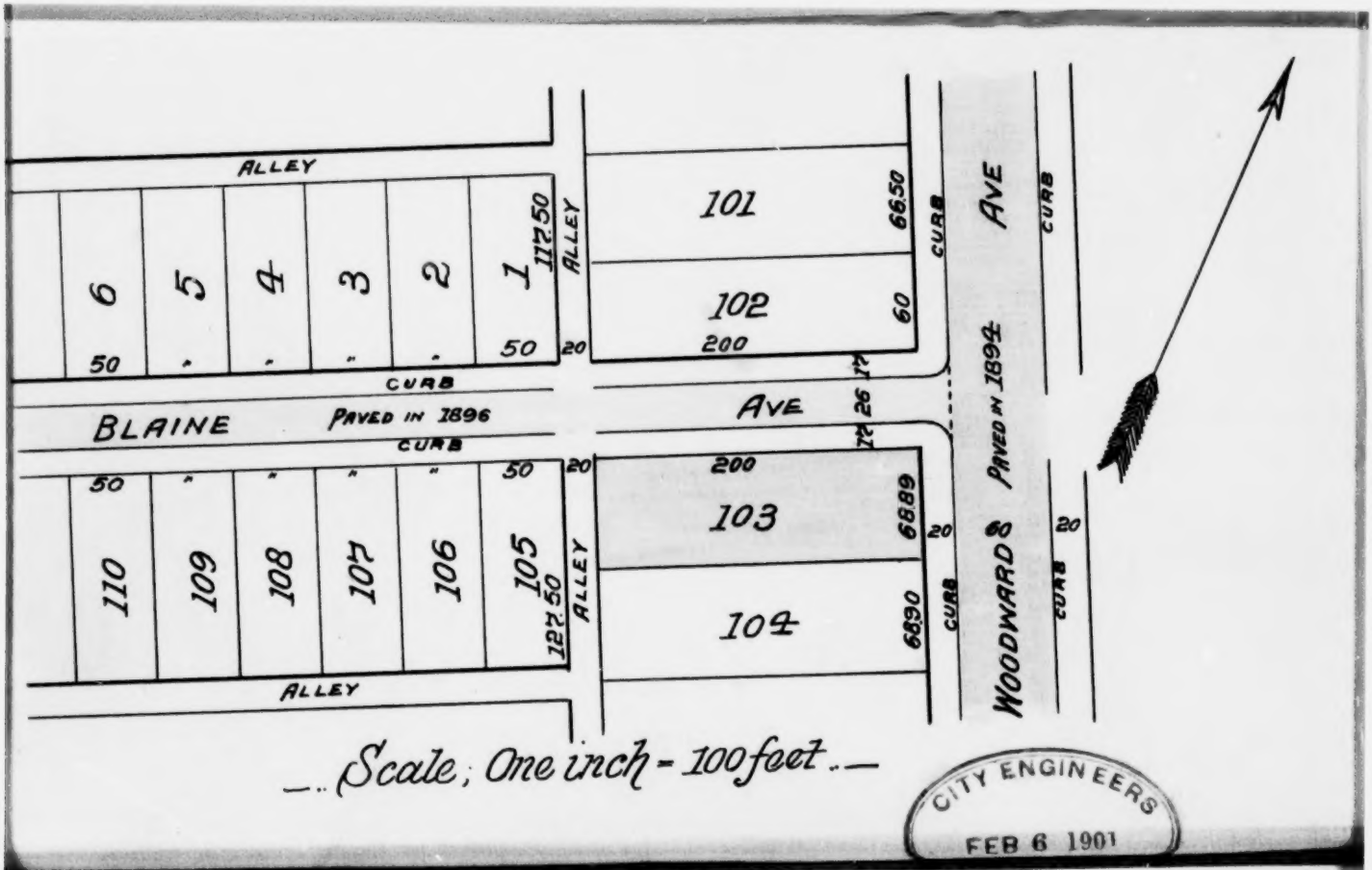
In December, 1892, the Common Council of the City of Detroit ordered Woodward avenue to be graded and paved from Pallister avenue to the Joy road, and in March, 1893, a contract to perform said work was let for the sum of $55,634.78. An assessment roll in four parts was duly made and the entire cost of the improvement, less the cost of grading and paving the intersection of streets and alleys, was assessed against the property, including that of the appellee, abutting on the improved portion of the street, *pro rata*, according to the frontage thereof on Woodward avenue. The amount assessed against the property of the appellee was $491.44, but he did not pay it, nor any part thereof, so on the 25th day of March, 1897, his said property was sold for the delinquent taxes, and was bid off to the City of Detroit. The time for redemption expired a year later, under the law, and said sale has now become absolute.

In February, 1896, Blaine avenue was similarly ordered to be graded and paved and a contract was duly let to perform said work for the sum of $11,462.32. Another assessment roll to defray the cost of the latter improvement was also duly made in four parts against the property, including that of the appellee, abutting on the portion of Blaine avenue thus improved, in the same manner as the assessment was made on Woodward avenue. The amount assessed the property of the appellee, for this improvement, was $442.68. The appellee did not pay this assessment, nor any part of thereof, so as each part became delinquent, the property was sold for such delinquency, and the sales for the first three parts have become absolute. The property was bid off to the City of Detroit, there being no other bidders.

The statutes under which these proceedings were had are a part of the charter of the City of Detroit, two copies of which we produce for the use of the Court.

Section 6 of Chapter 11 of the charter, being Compilers' Section 188, prohibits grading and paving to an extent exceeding $200,000 in any one year except upon the petition of the holders of the greater portion of the lands abutting on the part of the street proposed to be improved.

Section 33 of Chapter 11, being Compilers' Section 215, provides for entering into contracts for grading and paving


ALLEY
6
5
4
3
2
1
112.50
ALLEY
101
66.50
102
60
200
CURB
BLAINE
PAVED IN 1896
CURB
AVE
CURB
WOODWARD AVE
PAVED IN 1894
CURB
110
109
108
107
106
105
127.50
ALLEY
103
68.89
104
68.90
ALLEY
50
20
200
Scale; One inch - 100 feet
CITY ENGINEERS
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and for assessing the cost upon a local district. The portion of the section which bears upon the question under discussion is as follows:

> Sec. 33. Whenever the Common Council shall order any street or any portion thereof to be graded, or graded and paved, or repaved, it may enter into contract for the making of such improvement according to the provisions of this charter, and after the cost and expense thereof has been ascertained, it shall cause the same, except the cost of repaving, the cost of crosswalks, and of the work at the intersections of cross streets, to be assessed upon the lots and real estate herein made subject to such assessment as hereinafter provided. * * *

Section 39, Compilers' Section 216, provides that the property abutting on the unpaved portion of the street shall constitute one local assessment district, but gives the Common Council power to subdivide into two or more assessment districts. A portion of it is as follows:

> Sec. 34. For the purpose of such assessment, the lots and parcels of real estate situated on said street and fronting the portion thereof ordered to be improved, shall constitute one local assessment district, unless the Common Council, with a view to make the assessment more equal and just, shall subdivide the same into two or more assessment districts. Such subdivision, if made, must be done before asking bids for the work: and in no case shall a city block be divided in making such division. * * *

Section 35, Compilers' Section 217, provides for an assessment *pro rata*, according to frontage, and provides for relief where assessment is unjust because of irregular shaped lots.

> Section 35. The cost and expense of such improvement, except so much thereof as shall be for the work within the lines of intersection of cross streets and alleys, and for the crosswalks at such intersections, and for repaving streets, avenues and highways, shall be assessed ratably, according to their extent of front on the lots, parts of lots, or parcels of real estate directly fronting on and within the local assessment district: Provided, that if the assessment made on any such lot, or other parcel of land shall, by reason of its triangular or other irregular shape, seem to the Common Council to be inequitable, said council may direct a just portion of such assessment to be paid out of the general road

fund. * * * The word "front" as used in this act, shall be construed to mean that part of the lot or other parcel of land which directly abuts on that part of the street to be improved.

Section 36, Compilers' Section 218, points out how to assess land not platted into lots.

Whenever in the improvement of a street as aforesaid, any land or real estate which has not been duly platted into city blocks or lots, shall be required to be assessed to pay any part of the cost of such improvement, the council shall designate such part or parts thereof for such assessments as shall correspond as near as practicable to the portions of the block or blocks nearest adjacent thereto, subject to like assessment, and the part or parts so designated shall be assessed as near as may be in the manner herein provided for the assessment of lots.

Section 37, Compilers' Section 219, is quoted in full. It is the only provision of law relative to notice to the taxpayers, and a question is raised as to its sufficiency under constitutional rule.

Sec. 37. The Board of Assessors shall, when necessary, proceed to make out a list of all the lots or parcels of real estate, constituting a local assessment district as aforesaid, with the name of the owner or occupant of each lot or parcel of real estate, so far as said board can ascertain the same, and also the length of front of each lot or parcel of real estate fronting directly on such improvement. Such board shall then assess the cost and expenses of the work, chargeable as aforesaid upon the property in said list, ratably upon the several lots and parcels of real estate, according to the length of front thereof. When the assessment roll is thus completed, said board shall give notice by at least five publications in the city paper, that such roll is completed, and will remain in their office for twelve days from the first publication of said notice, for the inspection of all concerned. At the expiration of said twelve days, said board shall, after any needful revision and correction of such roll, sign the same and report it to the Common Council. Said council may then confirm the same, or may, when it shall deem necessary, refer the same back to said board for further revision or corrections. And when the same shall be corrected to the satisfaction of said council, it shall, by resolution, confirm the same.

> After such confirmation, such assessment shall constitute a lien, until paid, upon said lots or parcels of real estate, and shall be collected in such manner as may be authorized by law.

With the foregoing facts and charter provisions before it, the Circuit Court below granted a decree for the complainant, cancelling the assessments and setting aside the sales for delinquent taxes.

With respect to the facts in cause No. 511, submitted herewith, we are content with the statement made in the brief of Messrs. Russel & Campbell. It is claimed in both cases that the assessments complained of were in violation of the XIV. amendment of the Constitution of the United States.

As we understand it, there are but two propositions presented: First, a statute, directing an assessment to defray the cost of grading and paving a street to be made *pro rata* according to the frontage of the property assessed, excludes any consideration of benefits and is therefore unconstitutional.

Second, that the statute under consideration provides no opportunity for the persons assessed to be heard on the question of benefits, and therefore a proceeding under it, is in this respect, taking property without due process of law, and violates the XIV. amendment to the Constitution of the United States.

There have been so many recent decisions in different parts of the country by Circuit Courts of the United States and by some State Courts which seem to hold that the main question here presented has been disposed of by the decision in the case of Norwood vs. Baker, 172 U. S., page 269, that we have approached the discussion of the question with considerable embarrassment, but the recent decision in the case of Loeb vs. Trustees of Columbia Township, decided last December by this Court, if we correctly understand it, relieves us somewhat of our embarrassment and shows that the question is still open for discussion.

As we understand the import of the decision in the case of Norwood vs. Baker, it was not intended to overrule any previous decision of this Court, but simply held that there are limitations upon the power of the Legislature, even in regard to taxation, which the judiciary ought to, and will, enforce in a proper case, or to use the better language of the opinion, "the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizens' right of property."

In the case referred to there was a proceeding under the power of eminent domain by which Mrs. Baker's property was

taken from her for public use and for which it was pretended to give her adequate compensation, but the proceedings which followed, in the exercise of the power of taxation, took away this compensation and added to the injury by assessing her the cost of the proceedings besides. In other words, there was a dove-tailing of two proceedings, one under the power of eminent domain, and the other under the power of taxation, and when combined, the result was that Mrs. Baker had not only been deprived of certain land which she owned, but had been compelled to pay the expense of taking it away from her,—a result which ought not to be tolerated in any country where justice reigns. We think the transaction was well described by the counsel for Mrs. Baker when he said: "The case would not be any different if its council, after the condemnation proceedings and after the payment of the money to complainant, knowing it to be in her house, had left the council chamber, gone to her dwelling, demanded of her that she give the money back to the town, and refusing to do so, had taken it from her."

The exact counterpart of this case was attempted some years ago in the State of Michigan, where, in speaking of the facts, the Court said: "The result of all this was, not only that the Scripps property was taken without compensation, but they were assessed $115 for the privilege of having it done. They appeal on various grounds, among other things, the right to allow such results to be reached. The injustice of the finding is so monstrous that we should have no hesitation in setting it aside under the general power given us to review such proceedings."

City of Detroit vs. Daly, 68 Mich., at page 506.

We think, too, that the proceedings under the Norwood case were had under a statute which permitted municipalities to make an assessment without any consideration of benefits. And here we may as well admit at the outset of the discussion that, if this Court can say that the assessments in the cases at bar were levied under a rule which had no regard whatever to the benefits received by the property assessed, then they must go down.

> "The Legislature, in the exercise of the right of taxation, has the authority to direct the *whole or such part as it may prescribe* of the expense of a public improvement such as the establishing, the widening, the grading or the repair of a street to be assessed upon the owners of land benefited thereby."
>
> Bauman vs. Ross, 167 U. S., at page 589.
> Davidson vs. New Orleans, 96 U. S., 97.
> Hagar vs. Reclamation Dist., 111 U. S., 701.
> Spencer vs. Merchant, 125 U. S., 345.

Wallston vs. Nevin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316-328.
Ill. Cen. R. R. vs. Decatur, 147 U. S., 190.
Paulsen vs. Portland, 149 U. S., 30.

Also

Willard vs. Presbury, St. U. S., 14 Wall., 676.
Mattingly vs. Dist. Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282.

To determine the amount of taxes to be levied upon a local taxing district is, under all constitutional rules, equivalent to determining the amount of benefits which the district has received or will receive from the improvement for which the tax is proposed to be levied.

It will be conceded as a general proposition that the Legislature may fix a local taxing district and apportion an assessment to be levied upon it, provided it makes it according to benefits and that, under this rule, it may assess upon the district the entire cost of the improvement for which the assessment is made. The question then, before us, is this: can the Legislature establish a rule for assessment in advance of making the improvement, or must it wait until the cost of the improvement has been ascertained? Has not this Court answered this question?

> "The class of lands to be assessed for the purpose may be either determined by the Legislature itself by defining a territorial district or by other designation, or it may be left by the Legislature to the determination of commissioners and be made to consist of such lands and such only as the commissioners shall decide to be benefited."

Spencer vs. Merchant and Shoemaker vs. United States, above cited, and
Fallbrook Irrig. Dist. vs. Bradley, 164 U. S., 112, 167, 168, 175, 176.
Utman vs. Baltimore, 165 U. S., 719.

See also People vs. Brooklyn, 4 Comst. (N. Y)., 419, approved by this Court.

> "The rule of apportionment among the parcels of land benefited, also rests within the discretion of the Legislature and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

Mattingly vs. Dist. Columbia,
Spencer vs. Merchant,
Wallston vs. Nevin,

Lent vs. Tillson,
Paulsen vs. Portland,
Fallbrook Irrig. Dist. vs. Bradley,

above cited.

It ought to be assumed, we think, that the Legislature is informed of the general condition of the cities and villages which it has created, and of their needs, and it may be presumed to legislate fairly with regard to them. We think it is not to be supposed that a Legislature, in prescribing how local assessments shall be made for grading and paving streets in one of the municipalities of the State, acted without knowledge on the subject, nor that it acted capriciously or wantonly. There is evidence before this Court in the charter provisions themselves, which we have quoted, that the Legislature of the State of Michigan took considerable pains to prevent injustice so far as it could. For instance, it provided that in grading and paving a street it might divide the work into sections and make separate assessment rolls for each section, so that if the expense of grading one portion of a street should be greater than that of another, the assessment could be correspondingly adjusted.

Sec. 34, quoted herein.

Another provision gives the Common Council power to relieve where the assessment appears to be unjust, because of the irregularity in the shape of any lot.

Sec. 35.

Still another provision is with reference to lands that are not platted into lots, giving the council power to designate as abutting property to be assessed a sufficient amount of the unplatted land as shall correspond, as near as practicable, to that portion of the assessment district platted into lots.

Sec. 36.

It also provides that the city shall not grade and pave to an amount exceeding $200,000 in any one year, except upon petition of the holders of the greater portion of the land fronting on the proposed improvement.

Sec. 6, 188.

We speak of these provisions merely to demonstrate that the legislation was neither careless, capricious nor wanton.

The Legislature divides the State into counties. Each county, for many purposes, is a local assessment district, and the Legislature provides in advance what may be assessed upon that district. It also divides counties into townships, which

are likewise local assessment districts for certain purposes. It also provides in advance what may be assessed upon them. Townships are subdivided into road districts, each one of which is a local assessment district, and the statute provides in advance what may be assessed upon each one of these. The township is also divided into school districts, and each one of these school districts is a local assessment district, and the Legislature provides in advance what may be assessed upon these. Each one of these districts is authorized in advance to make certain improvements and to assess the cost of those improvements upon the district. The Legislature may specifically authorize the construction of a bridge, mark out the local assessment district for it and direct in advance that the entire cost of the bridge be levied upon it.

All these things are necessary to the proper conduct of the internal affairs of the State and its many subdivisions. Although many technical questions have arisen over the administration of these powers, yet we are not aware that the power of the Legislature to do these things in advance has been questioned.

In the organization of a great city it is always necessary to lay down some rules and make some provisions for the conduct of its internal affairs. Streets must be paved, improved, repaired and maintained. Sewers must be constructed. Many other improvements must be made. It is conceded that the cost of all these things may be assessed upon the property which has been or will be specially benefited by these improvements to the amount of the benefits. This has been directed by the Legislature of Michigan with reference to the City of Detroit. This Court is now asked to say that in laying down rules by which the City of Detroit is to be guided in making assessments for grading and paving its streets, the Legislature, in defining the limitations of taxing districts therefor and directing that the whole of the cost to be levied thereon did not or could not take into consideration the benefits accruing to the district from such improvement. Is it impossible for the Legislature to make this determination, or must the assessment for benefits be left to the ever-varying discretion of some local officer or board?

It will be conceded, we suppose, that the Legislature might have provided the rule in advance that the entire cost of any specific grading and paving should be assessed upon the whole city. Does its power to do so disappear with the attempt to make the taxing district less in size than the entire city? The city is divided into seventeen wards, each one of which is locally assessed for what is now the ward road district fund. Had not the Legislature power to grant such an authority? If the Legislature may in advance make the city one assessment district,

may it not make a ward a local assessment district, or are we to say that the power of the Legislature to make a rule in advance, upon this subject, depends upon the size of the assessment district?

A large number of courts and many Legislatures have made a distinction between assessments for benefits derived from opening a street and assessments for benefits derived from grading and paving a street after it is opened. The Michigan Legislature, with reference to street openings in the City of Detroit, instead of fixing a taxing district and directing a portion to be spread thereon, has left the determination of these questions to the Common Council, but with regard to grading and paving, has defined the rule of assessment itself and fixed the district, and the Supreme Court of Michigan has repeatedly held that assessments thus directed by the Legislature to be made according to frontage are valid.

Williams vs. Mayor, 2 Mich., 560.
Motz vs. Detroit, 18 Mich., 495.
Sheley vs. Detroit, 45 Mich., 431.
Kalamazoo vs. Francois, 115 Mich., 554.
Cass Farm Co., Ltd., vs. Detroit, 7 Detroit Legal News, p. 281.

the latter being one of the cases now being considered here.

With regard to street opening assessments it has made a different determination.

Detroit vs. Judge of the Recorder's Court, 112 Mich., 588.

The writer has often thought that perhaps it has been the marked distinction between the different kinds of improvements that has led to the apparent confusion on the subject of local assessments.

For instance, it seems to be almost universally recognized that grading and paving a street in a large city is certain to benefit the abutting property, while opening a street through a piece of property and taking a part of it may or may not benefit that which remains.

To illustrate in a specific way: In the case of Norwood vs. Baker, a highway was opened through Mrs. Baker's property connecting streets which led up to it on either side, affording greater convenience to the property adjoining Mrs. Baker's and to the public at large. It seems to us that it is purely arbitrary to say under such circumstances that the abutting land of Mrs. Baker was the only property specially benefited by the improvement. The streets may have been laid out about her land in such a way that no new street, so far as her land was concerned, was necessary. Again, her land might have been situated so that cutting a highway through a portion of it or

through the middle of it would destroy the market value of the remaining land. It would seem to be certain that whether opening a street is a direct benefit to the abutting land or not must always depend upon circumstances. This cannot be said of grading and paving a street. It may be fairly asserted of this improvement that it always benefits the abutting property. In Detroit, under the law, most of it is done at the request of the property holders.

It may be argued that there might now and then be a case where the benefits would not equal the cost of the improvement and possibly this may be so, but these could only be regarded as exceptions to the general rule.

As to the second proposition, which relates to the question of the right of the taxpayer to be heard on the question of benefits and also involves the question of notice, there is very little to be said.

With regard to local assessments, three things are required to be done.

First. Fixing the local assessment district.

Second. Determining the amount or portion to be spread upon such district.

Third. Apportioning the amount determined upon among the different parcels of land in the district.

It has been shown already that the first two questions are purely legislative and cover the question of benefits. They are legislative because they are questions of public policy. The question of whether or not a tax shall be raised and how much is always a public and legislative question in which all alike are interested, but when these legislative determinations have been made and the proper board or officer proceeds to carry them into effect by making a tax roll which describes the individual properties to be taxed and sets forth and apportions the amount of the tax on each, then the proceedings reach the individual and before such tax can be enforced against him or made a lien upon his property, he certainly has a right to be heard. He has a right to know whether the tax ordered by the Legislature has been equally and properly apportioned between him and his neighbors.

This opportunity has been provided for by the charter provision which has been cited. This section provides that the Board of Assessors, after completing the roll, shall give notice by at least five publications that such roll is completed and will remain in their office from the first publication of said notice for the inspection of all concerned. After any needful correction and revision is made, it is then sent to the Common Council for confirmation. That body is also given the power to direct

further correction to be made. This provision has been construed by the Michigan Supreme Court as giving taxpayers a chance to be heard.

Beecher vs. Detroit, 92 Mich., at page 274.
Voigt vs. Detroit, 7 Det. Legal News, page 23.

As to the proposition that the taxpayer is entitled to be heard upon legislative questions, such as the first two stated above, we are not aware that it is sustained by any authority, but whether it is or not, we suppose this Court has settled that question.

> "If the Legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Spencer vs. Merchant, already cited.
McMillan vs. Anderson, 95 U. S., at page 37.
Davidson vs. New Orleans, already cited.
Hagar vs. Reclamation Dist., above cited.

Notice by publication is sufficient.

Davidson vs. New Orleans.
Spencer vs. Merchant.
Lent vs. Tillson.
Paulsen vs. Portland.
Fallbrook, etc., vs. Bradley.
Already cited.

In conclusion, the case before us seems to be this.

The complainant neglected to pay his taxes for several years and then comes into court, without alleging that any wrong has been done him, without alleging that the taxes levied were unjust or even burdensome, without making any claim of oppression, and so far as the record discloses without even availing himself of the opportunity which the law afforded him to go before the board of assessors or the common council and complain, without showing that his property or any portion of it has been taken from him wrongfully, and asks that the taxes be cancelled and that the tax sales be set aside. He makes no complaint of any irregularity in the proceedings, but bases his whole claim upon the bare proposition that a rule adopted by the Legislature, directing an assessment to defray the cost of grading and paving the street in front of his property to be assessed pro rata according to frontage, excludes any consideration of benefits and is, therefore, unconstitutional.

This doctrine is revolutionary, and as we understand it, is not in accord with the cases adjudicated by this Court. Moreover, it is a dangerous innovation of the legislative domain. The judiciary cannot inquire into this question without determining what the benefits were and whether there were any. If it can do this with the legislative assessment it seems to be clear that it may make the same inquiry with reference to an assessment made by the local board or officer. The final result of it all would be that the judiciary would be called upon to determine in every contested case the question of benefits, and each case would, under the claims made by complainant, present a Federal question, to be finally determined by this Court. As we understand the import of the Norwood decision, it simply determines that there had been an abuse of legislative power, and that the language of the Ohio statutes permitted the local body to make an assessment without considering the benefits. The very language of the statute indicates that.

It gives the council an option to assess according to benefits received or to do something else, allowing the council to determine which method it would adopt. This would be an assessment without regard to benefits. We know of no decision which permits this to be done. We suppose the doctrine to be that the courts may inquire into the question of an abuse of legislative discretion, precisely as a superior court may inquire into the abuse of discretion by an inferior court. In either case, unless such an abuse clearly appears, the exercise of discretionary power is not interfered with.

In Pennsylvania a distinction is made between urban and suburban highways, where it is held that assessments, by frontage, within cities are just and proper, while it is "ruinously unjust" when applied to farm lands outside of cities. While other courts reject this distinction it must be admitted there is much force in the reasoning which makes it.

Seely vs. Pittsburgh, 82 Pa. St., 360.

Kentucky and Iowa courts have made distinctions of a similar character. But we speak of these merely as illustrative of what we think is the proper rule relative to interference with legislative discretion; viz., that it must clearly appear that there has been an abuse of it.

If the Legislature adopts a rule of assessment which, *on its face*, or which in its certain operation provides for the "exaction, from the owner of private property, of the cost of a public improvement in *substantial* excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use with-

out compensation," and for that reason, is an abuse of legislative discretion.

Does the rule that the cost of grading and paving a street may be assessed upon the abutting property according to frontage, herein complained of, come within the foregoing classification? We submit that it does not.

It is common knowledge that grading and paving a street does always improve and benefit the abutting property. Is it for the Court or the Legislature to say how much the benefit is?

But the complainant is pursuing a shadow. If the present rule be set aside, it follows that the benefits must be determined by some local board. That board is subject to constant change. The amount of benefit received from a public improvement is always a matter of opinion. The opinion of a local board this year may not be the same as the new one next year. If each individual case is to be determined by itself as it occurs, then whim, bias, prejudice, self-interest, political influence will to a greater or less extent enter into the determination of benefits. How much better to lay down a fixed rule which applies to all cases of like character and which courts recognize as "more just than any other."

Williams vs. Mayor, etc., 2 Mich., 560.
Sheley vs. Detroit, 45 Mich., 431.

Is not the adoption of such a rule far preferable in all cases where it can safely be done?

Nothing can be gained by leaving the determination of benefits to a local board. Its determination will be final and not subject to judicial review, except for precisely the same reason that the legislative determination can be reviewed, viz: that it has abused its discretion.

In the court below, the question was asked if the Common Council could not, under our theory, pave a street with gold and assess the cost upon the abutting property. It certainly could not. That would be an abuse of discretion. But it could be done just as well under the rule for which they contend as under the rule which they assail. In any event, the determination of the benefits must be left to the discretion of some one and that determination is final, except it is made to appear that there has been an abuse of discretion.

If the local body is controlled by a fixed rule which is known and recognized as a just one in the long run, is it not better for all concerned, and especially for those who are to be taxed?

C. D. JOSLYN,
Of Counsel for City of Detroit.